SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1955

ALFRED G. ZABEL and DAVID H. RUSSELL,
Petitioners,

v.

R. P. TABB, COLONEL, CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA, DISTRICT; STANLEY R. RESOR, SECRETARY OF THE ARMY; AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 16, 1970.[1]

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported; the opinion of the United States District Court

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[1] Petitioners have both died during the appellate proceedings herein. A motion for substitution of their legal representatives is pending in the Court of Appeals.

for the Middle District of Florida is reported at 296 F. Supp. 764. The opinions of the Court of Appeals and the District Court are reproduced as Appendices A and B, respectively, to this petition. The order of the Secretary of the Army which this case seeks to review is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1970 (Appendix D). A timely petition for rehearing was denied on August 10, 1970 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, after all necessary state approvals had been obtained, and it had been administratively found that there would be no material adverse effect on navigation, the Secretary of the Army nevertheless had authority to deny, on grounds of fish and wildlife conservation, an application to dredge and fill privately owned submerged lands.

2. Whether prohibiting the only feasible use which could be made of privately owned submerged lands in order to avoid harm to marine life is a taking of private property for public use without just compensation, in violation of the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved, pertinent portions of which are set forth in Appendix F to this petition, are: The Fifth Amendment to the United States Constitution; the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301 *et seq.*; the Fish and Wildlife Act

of 1956, 70 Stat. 1119, 16 U.S.C. §§ 742a *et seq.*; the Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 72 Stat. 563, 16 U.S.C. §§ 661 *et seq.*; and the Rivers and Harbors Act, 30 Stat. 1151, 33 U.S.C. §§ 401 *et seq.*

STATEMENT OF THE CASE

This action seeks review of an order of the Secretary of the Army denying a permit, sought under § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, to dredge and fill in navigable waters within the territory of the State of Florida. The jurisdiction of the District Court was invoked because the action is one arising under the Constitution and laws of the United States (28 U.S.C. § 1331) and involves agency action reviewable under 28 U.S.C. § 1361 and § 10 of the Administrative Procedure Act (5 U.S.C. §§ 701-706 [Supp. V]).

Petitioners own land riparian to Boca Ciega Bay, Pinellas County, Florida, and adjoining land submerged beneath the navigable waters of the Bay. They acquired this property sometime before June 30, 1950, by purchase from the Trustees of the Internal Improvement Fund, an agency of the State of Florida. This conveyance carried with it an express statutory right to "bulkhead and fill in the same" in accordance with state law,[2] and by virtue of § 3 of the Submerged Lands Act petitioners are vested with title and ownership of the submerged land and the natural resources thereof and have the right and power to use "said lands and natural resources all in accordance with applicable State law . . . ."

Petitioners desire to dredge and fill on their submerged property in the Bay for a trailer park, with a bridge or culvert to their adjoining upland. Their right to do so under state law has been established in proceedings which

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[2] Florida Laws, 1917, ch. 7304, § 5. See *Zabel* v. *Pinellas County Water and Nav. Contr. Auth.*, 171 So.2d 376, 380 (Fla. Sup. Ct. 1965).

involved review by the Supreme Court of Florida and the eventual consent or approval of all state and local authorities having jurisdiction to prohibit the work.[3] In the course of these proceedings the various state and local agencies and the Florida courts weighed the effect of the proposed work upon: (a) transportation, recreation and other public purposes or conveniences; (b) the free use of the waterways and navigable waters; (c) erosion control; (d) tidal currents; (e) shoalling, channels, stagnant pockets and storm damage; (f) natural beauty and recreational advantages of Pinellas County; (g) conservation of wildlife and marine life; and (h) the uplands surrounding the development or affected by it.[4]

Petitioners then applied to the Corps of Engineers for a federal dredge and fill permit as required by § 10 of the Rivers and Harbors Act. The application was opposed by several state and local agencies without jurisdiction over the proposed work under state law, by the Pinellas County Water and Navigation Control Authority (which had earlier issued a state dredge and fill permit pursuant to court order) and by approximately 700 individuals. The United States Fish and Wildlife Service, Department of the Interior, also opposed the work, on the ground that it "would have a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay." The application was supported by the Board of Pilot Commissioners, Port of St. Petersburg, on the basis of a finding by its investigator that the work would "greatly aid navigation in this area." (R. 18, 39.)[5]

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[3] See the opinion of the Court of Appeals, App. A, pp. 23-24, *infra*; *Zabel* v. *Pinellas County Water and Nav. Contr. Auth.*, *supra*; *Pinellas County Water and Nav. Contr. Auth.* v. *Zabel*, 179 So.2d 370 (Fla. Dist. Ct. App. 1965).

[4] Fla. Stat. Ann. § 253.124; Laws of Florida, ch. 31182, Spec. Acts of 1955.

[5] These and similar references are to the record as printed in the Appendix in the Court of Appeals.

After a public hearing, the respondent District Engineer, Colonel Tabb, recommended to his superiors in the Corps of Engineers that the application be denied. Although finding that the project would have "no material adverse effect on navigation," he concluded as follows:

> "Careful consideration has been given to the general public interest in this case. The virtually unanimous opposition to the proposed work as expressed in the protests which were received and as exhaustively presented at the public hearing have convinced me that approval of the application would not be in the public interest. The continued opposition of the U. S. Fish & Wildlife Service despite efforts on the part of the applicants to reduce the extent of damage leads me to the conclusion that approval of the work would not be consistent with the intent of Congress as expressed in the Fish & Wildlife Coordination Act, as amended, 12 August 1958. Further, the opposition of the State of Florida and of county authorities as described in paragraph 5 above gives additional support to my conclusion that the work should not be authorized." (R. 41.)

The Chief of Engineers adopted the finding of the District Engineer as to absence of interference with navigation. Indeed, he stated that "dredging to create the fill would improve water depths in the immediate area." (R. 44.) Nevertheless, on the basis of the evidence presented by the Fish and Wildlife Service as to the effects on fish and wildlife resources, and "the strong objections expressed in the protests and at the public hearing," he concluded that approval of the application would be "contrary to the public interest," and recommended that the Secretary of the Army deny it. (R. 45.) On February 28, 1967, the Secretary of the Army issued his decision to deny the application (App. C), finding that issuance of the requested permit:

> "1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,

2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),

3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and

4. Would be contrary to the public interest."

Petitioners then instituted this suit in the District Court for the Middle District of Florida seeking review of the Secretary's determination and an order requiring him to issue a permit, and alleging in part (a) that the Secretary's action, in light of the findings of the Corps of Engineers, was beyond his statutory authority, and (b) that the denial of the application on the grounds stated was an unconstitutional taking of private property. (R. 5, 6.) Petitioners submitted an uncontroverted affidavit that "no practical use may be made of the plaintiffs' submerged land unless the same is altered by filling to bring the same above high water mark." (R. 91.) They also acknowledged that "there was evidence before the Corps of Engineers sufficient to justify an administrative agency finding that our fill would do damage to the ecology or marine life on the bottom." (R. 130.)

After a motion by the respondents to dismiss for lack of jurisdiction was denied, both sides moved for summary judgment. The District Court granted summary judgment for the petitioners with an opinion containing findings and conclusions. (See App. B.) On appeal by the respondents, the Court of Appeals reversed, rendering judgment for the respondents and holding, in respects material here: (a) that the action of the Secretary, in overriding the expressed judgment of the pertinent state agencies on grounds other than navigation, was authorized by applicable federal statutes and within the federal commerce power, and (b) that no "taking"

had occurred since the "waters and the underlying land" are subject to a "paramount servitude in the Federal government." (See App. A.)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important Issue of Statutory Interpretation with Constitutional Overtones, Involving the Bounds of Federal and State Authority Over Lands Beneath Navigable Waters and the Rights of Private Owners of Such Lands, Which Has Not Been But Should Be Decided by this Court.

The Court of Appeals described this case as being "of spectacular public importance." (App. A, p. 21, *infra*.) This characterization aptly fits its holding that there is no statutory or constitutional barrier to the Secretary's denial of a dredge and fill permit on grounds of fish and wildlife conservation, notwithstanding an administrative finding that no adverse effect on navigation would result, and in the face of express approval by the Government of the State of Florida which had weighed the very same considerations. This holding of the court below not only contradicts the longstanding construction of the extent of the Secretary's power, but more importantly it significantly alters the historical balance between federal and state authority to administer the vast areas of land beneath navigable waters within the territories of the States. In so doing, it revives aspects of a jurisdictional controversy which engaged the attention of this Court, the Congress, the executive branch of the federal government and the governments of all the States during a period of some three decades in this century—a controversy which the Submerged Lands Act was intended to settle. And it reaches the anomalous result that petitioners—who, by virtue of § 3 of the Submerged Lands Act, own and have the right to use the "natural resources" of the submerged lands in question, which are broadly defined by § 2 of that Act as including the "fish, shrimp, oysters,

clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life"—are denied the power to use their property because of the harm which it will do to these very natural resources that they own.

The consequences of this surprising result are such, and the reasons advanced are sufficiently questionable and inconsistent with prior decisions of this Court, as to warrant review:

a. From the enactment of § 10 of the Rivers and Harbors Act in 1899, until the decision below, no federal court had held that the Secretary may consider anything other than the effect on navigation when passing on applications for dredge and fill work in the navigable waters of the United States.* Instead, the consistent and unbroken course of judicial and administrative interpretation, in accordance with the language of the statute and its emphasis on preserving "navigable capacity," required the Secretary's decisions to turn on whether the proposed work would constitute an "unreasonable obstruction to navigation." *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1929); *Miami Beach Jockey Club* v. *Dern*, 66

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* Neither of the cases cited by the court below so held. In *United States* v. *Dern*, 289 U.S. 352 (1933), this Court simply declined to inquire into the legality of the Secretary's determination, and held the case to be an appropriate one for the lower court, in its discretion, to refuse the exercise of its equitable jurisdiction. The reason was that the court would be doing a useless act since the area was being condemned for a road. 289 U.S. at 359-60. The other case relied upon, *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir. 1970), was described by the court below as holding that the Secretary "cannot be oblivious to the effect of fill projects on the beauty and conservation of natural resources". However that case appears to hold only that the Secretary of the Army should have withheld action on an application to dredge and fill until the Secretary of Transportation had had an opportunity to consider matters relevant to his approval of another portion of the overall expressway project in connection with which the dredge and fill permit was sought. See 425 F.2d at 106. Petitions for certiorari to review that decision are now pending. *Parker* v. *Citizens Committee for the Hudson Valley*, No. 614; *Volpe* v. *Citizens Committee for the Hudson Valley*, No. 615.

App. D.C. 254, 255, 86 F.2d 135, 136, *cert. denied*, 299 U.S. 556 (1936); 34 Op. Atty. Gen. 410, 416, 418 (1925); and *cf. Louisville Bridge Co.* v. *United States*, 242 U.S. 409, 424-25 (1917). By 1929, as this Court said in the *Wisconsin* case:

> "This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute." 278 U.S. at 413.

This Court went on to hold that, as so construed, § 10 was not an unlawful delegation of legislative power. 278 U.S. at 414. Despite this authoritative construction over 40 years ago, and without any intervening change in the statutory language, the court below has held that the Secretary can deny, solely on conservation grounds, a permit for dredge and fill work which would not interfere with navigation.[7]

b. The court below dismissed as a "nice argument" (App. A, p. 29, *infra*) petitioners' reliance on the rights of ownership and use of submerged lands and their natural resources in accordance with applicable state law, which are expressly granted by § 3 of the Submerged Lands Act, subject only to the reserved power of the United States for purposes of navigation, flood control, and production of power. For that, the court relied principally upon its reading of the reservation in § 6 of the Act by the United States of its "navigational servitude" and its

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[7] Since the Secretary's decision in this case, the regulations under the Rivers and Harbors Act were amended in 1968 to state that in disposing of applications to dredge and fill, consideration will be given to "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest." 33 C.F.R. § 209.120 (d) (1). These considerations of aesthetics, ecology, etc., are of such broad and uncertain content that it is hard to imagine a more sweeping assertion of administrative power or one which smacks more of unchannelled delegation of legislative authority. *Cf. Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935).

rights and powers of regulation "for purposes of commerce, navigation, national defense and international affairs" all of which are declared to be "paramount to" the rights of ownership and administration granted by § 3. In so doing the court took too expansive a view of the reservation and too narrow a view of the scope and purpose of the grant.

It is indeed true that in enacting the Submerged Lands Act Congress intended to leave "where it found them" congressional powers over navigable waters within state boundaries, and the lands beneath such waters, *United States* v. *Rands*, 389 U.S. 121, 127 (1967)—*i.e.*, it intended to preserve the division of state and federal controls over such lands and waters, and their resources (including marine life), which it understood to be in effect before this Court's historic decision in *United States* v. *California*, 332 U.S. 19 (1947), and the subsequent decisions in the *Louisiana* and *Texas* cases, 339 U.S. 699 and 707 (1950). That jurisdictional balance will, however, be seriously dislocated, and the grants made to the States (and to their grantees such as petitioners) will be negated, if the decision below is allowed to stand.

The intent of Congress in enacting the Submerged Lands Act, reflected in the language and the legislative history of the statute, was to restore to the marginal seas within state boundaries the historic balance of federal-state rights and responsibilities which had always been acknowledged in connection with inland navigable waters. Congress was not, as the court below erroneously assumed (App. A, p. 30, *infra*), solely motivated by a desire to return to the States the right as owners to reap economic rewards from exploitation of oil and gas reserves, though it was certainly the States' assertion of such ownership rights in their own territorial waters which most directly led to this Court's decisions in the *California*, *Louisiana*, and *Texas* cases and, ultimately, to the Submerged Lands Act. Congress was also seriously

concerned about the implications of the *California* decision for state control (regulatory as well as proprietary) over non-mineral resources, including marine life. This concern, and Congress' understanding concerning the nature of state jurisdiction over such resources which the Act would restore, are clearly revealed by the legislative history. For example, the House and Senate committees explained:

> "The earliest assertions by the States of proprietary rights in their submerged lands arose in connection with regulation of fishing. Except in a few instances, where international treaties were involved, State control of fishing in navigable waters, within the State's boundaries, has been exclusive. . . .
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> ". . . State control of fishing, especially for sedentary fish, such as shrimp, oysters, clams, lobsters, etc., has been based upon the State's ownership of the soil. . . .
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> "No witness contended that the California decision is not broad enough to permit Federal regulation of these resources. No evidence was submitted to show that the public interest would be better served by transferring the management of these resources to the Federal Government and thereby destroying the existing controls that have long been established by the States.
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> ". . . The uses to which these lands are put are essentially local in character, and are of primary concern to the people of the particular locality. Any conflict of interests arising from the use of the submerged lands should be and can best be solved by local authorities." [8]

[8] These statements appear in H.R. Rep. No. 1778, 80th Cong., 2d Sess., at pp. 13-23, and S. Rep. No. 1592, 80th Cong., 2d Sess., at pp. 15-25. These reports were prepared in connection with prior versions of the legislation, substantially identical in material re-

These remarks by congressional committees in connection with enactment of the Submerged Lands Act rest securely on a long line of constitutional decisions by this Court and consistent congressional policy, unbroken to the present day. It was early established that upon the formation of the Union and the later admission of additional States, there passed to the States, as an inherent element of state sovereignty, the "absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin* v. *Waddell*, 16 Pet. 366, 410 (1842); *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229 (1845); *Weber* v. *Harbor Comm'rs*, 18 Wall. 57, 65-66 (1873); *Shively* v. *Bowlby*, 152 U.S. 1, 11-15 (1894). Both Congress and this Court have always recognized the exclusive right of the States to regulate fisheries and govern the conservation of marine resources (other than navigation itself, and the production of power from moving water). *E.g.*, *Smith* v. *Maryland*, 18 How. 71 (1855); *McCready* v. *Virginia*, 94 U.S. 391 (1876); *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891); *The Abby Dodge*, 223 U.S. 166 (1912). And while the Constitution vests in Congress a "paramount navigational servitude," and preeminent authority to regulate navigable waters, as an aspect of its commerce power, that authority has been understood to be limited to matters having a "real or substantial relation to the control of navigation or appropriateness to that end." *United States* v. *River Rouge Co.*, 269 U.S. 411, 419 (1926). Accordingly, and as more fully discussed in point 2, *infra*, it is in the light of this principle that the "paramount servitude" reserved in § 6

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spects to the bill finally enacted in the 83d Congress, and they were incorporated by reference in the House and Senate committee reports on the latter. See H.R. Rep. No. 215, 83d Cong., 1st Sess., p. 4; S. Rep. No. 133, 83d Cong., 1st Sess., p. 23.

The full discussion in which the above quotations appear is reproduced as Appendix G.

of the Submerged Lands Act is to be construed and limited as a power whose proper exercise has always been regarded as necessarily linked to the regulation and improvement of navigation.*

In sum, before the *California* decision cast doubt on the issue as regards the marginal seas, both Congress and this Court had consistently treated the conservation of marine life and the regulation of fisheries in state waters as subject exclusively to state jurisdiction. The language of the Submerged Lands Act and its legislative history show clearly the intent of Congress to restore the application of this rule to ocean waters within state boundaries, by granting to the States (and their grantees such as petitioners) the ownership of and right to use the bottom and the natural resources in accordance with applicable state law. That intent is frustrated and the grant made to the States is rendered illusory by the decision below.

c. The Court of Appeals also held that the Secretary could properly take into account a "government-wide policy of environmental conservation" which it found to be "spectacularly revealed" in two federal statutes, the Fish and Wildlife Coordination Act, and the National

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* It is true that Congress has adopted a relatively more expansive view of its power over navigable waters in connection with the licensing of dams, and this Court has sustained that view. *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967); *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940); Federal Power Act, § 10, 16 U.S.C. § 803. As contrasted with lands under navigable waters, however, the flow of navigable streams is not itself property capable of state or private ownership, and the harnessing of that flow for public purposes thus raises none of the considerations of private property rights or conflicting state-federal responsibilities present here. *E.g.*, *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 66, 69 (1913); see *Stockton* v. *Baltimore and N.Y.R.R.*, 32 Fed. 9, 19-20 (Cir. Ct., D.N.J. 1887). Section 2 of the Submerged Lands Act, 43 U.S.C. § 1301, expressly excludes from the definition of "natural resources," ownership of which was restored to the States and their grantees: "water power, or the use of water for the production of power."

Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. §§ 4321-47 (Supp. V). Specifically, the court construed Section 2(a) of the Fish and Wildlife Coordination Act (as modified by a 1958 amendment) to require the Secretary to consult with the Fish and Wildlife Service with a view to conservation of wildlife resources before issuing a dredge and fill permit to a private owner of submerged lands beneath navigable waters within the territorial limits of a State, and to "take such factors into account" in passing on the application. (App. A, pp. 37-38, *infra.*)

Both of these statutes, of course, were enacted after the Submerged Lands Act, and neither purports to modify or amend either that Act or the Rivers and Harbors Act. In addition, the National Environmental Policy Act of 1969 followed by two years the Secretary's decision denying the permit sought by petitioners, and the Court of Appeals' reliance on that Act thus poses the propriety of judging administrative action in accordance with statutory standards not in effect when the action was taken.[10]

As to both of the statutes relied on by the Court of Appeals, the question arises whether Congress can be said to have upset, by implication, the grant of rights and the allocation of jurisdiction which were so carefully made in the Submerged Lands Act. Before any such conclusion can be reached, a number of comparisons and contrasts have to be made. These would include: (a) comparing the general language of the later statutes and isolated statements from their legislative histories with the clear statement of congressional policy and the grant embodied in the specific language and legislative history of the Submerged Lands Act; (b) contrasting the care and attention given to the Submerged Lands Act in resolving a long-standing federal-state controversy of mo-

[10] On this point the court below made only the bland announcement that "the correctness of [the Secretary's] decision must be determined by the applicable standards of today." App. A, p. 46, *infra.*

mentous proportions, after extended debate and negotiation among the legislative and executive branches of the federal government and the governments of all the States, with the fact that the 1958 amendment to the Fish and Wildlife Coordination Act was passed without discussion on the floor of either house, with House hearings lasting only a small part of one day and with no hearings whatever in the Senate; and (c) otherwise considering the background and historical context of each of the statutes involved, including the fact that the statutory charter of the Fish and Wildlife Service itself carefully preserves the rights of the States under the Submerged Lands Act.[11]

The opinion below gave scant attention to these factors, despite their crucial bearing on the issue whether the States, or the Secretary of the Army, shall regulate fish and wildlife conservation and other matters embraced within the "general public interest" on the millions of acres of submerged lands within the boundaries of the States. Plainly this is a matter which deserves consideration by and an authoritative response from this Court.

2. The Decision Below Ignores Past Decisions of this Court Which Restrict the Right To Take Without Compensation Private Property Under Navigable Waters to Situations Where the Interests of Navigability Are Served.

Petitioners acquired the submerged lands here in question for valuable consideration from an agency of the State of Florida. This grant carried with it the right to perform dredging and filling work. Petitioners' owner-

[11] The Fish and Wildlife Act of 1956 specifically provides that nothing in it shall be construed "to interfere in any manner with the rights of any State under the Submerged Lands Act . . . or to supersede any regulatory authority over fisheries exercised by the States either individually or under interstate compacts;". 16 U.S.C. § 742i (Supp. V).

ship of and right to use such lands and their natural resources were confirmed by the Submerged Lands Act. Since no practical use may be made of the property without dredge and fill work, petitioners argued to the court below that the Secretary's action constituted a "taking" of private property for a public purpose, *i.e.*, to serve as a breeding ground for marine life. The Court of Appeals disagreed, stating that "the waters and underlying land are subject to the paramount servitude in the Federal government which the Submerged Lands Act expressly reserved . . . ." (App. A, p. 49, *infra*). This holding by the court below significantly expands the scope of the government's right to take without compensation lands under navigable waters, as heretofore recognized by this Court, and thus casts into doubt the nature of both state and private title to vast areas of the nation lying under navigable waters within state boundaries.

The "paramount servitude" referred to by the Court of Appeals does exist, and was preserved by § 6 of the Submerged Lands Act. Its "proper exercise" does not constitute "an invasion of any private property rights," and any loss so occasioned is not compensable under the Fifth Amendment. *United States* v. *Rands*, 389 U.S. 121, 123 (1967). It is, however, a power whose proper exercise has always been regarded as necessarily linked to the regulation and improvement of navigation.

> "All navigable waters are under the control of the United States *for the purpose of regulating and improving navigation*, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude *in respect of navigation* created in favor of the Federal government by the Constitution." *Gibson* v. *United States*, 166 U.S. 269, 271-72 (1897) (Italics added).[12]

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[12] See, *e.g.*, *United States* v. *Chicago, M., St. P. and P. R.R.*, 312 U.S. 592, 593 (1941) ("for the improvement of navigation"); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 66 (1913)

This Court has stated that "it is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and *narrower in scope*, that frees the Government from liability in these cases." *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 808 (1950). (Italics added.) This is true notwithstanding that congressional judgments as to what is and what is not in the interests of navigation are ordinarily respected by this Court, and that the "fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power." *Arizona* v. *California*, 283 U.S. 423, 456 (1931).[13] In *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), this Court decided that Congress had not intended to exercise its navigational servitude with respect to each and every one of a coordinated group of water control projects, but had acted in connection with the project in question pursuant to its constitutional power to provide for the general welfare of the United States. 339 U.S. at 736-38. The Court therefore held private claimants, whose grasslands would be deprived of irrigation by the project, to be entitled to compensation.

This Court has recognized that "action in the form of regulation can so diminish the value of property as to constitute a taking," but has said also that "the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."

("for the purposes of navigation"); *Scranton* v. *Wheeler*, 179 U.S. 141, 153 (1900) ("for the purpose only of improving . . . navigation").

[13] See, *e.g.*, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391-92 (1945); *United States* v. *Chicago, M., St. P. and P. R.R.*, *supra*, 312 U.S. at 596; *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 65-66; *Blake* v. *United States*, 295 F.2d 91, 96-98 (4th Cir. 1961).

United States v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). These rules were applied in a situation closely analogous to that presented here in *United States* v. *Causby*, 328 U.S. 256 (1946). There, a private landowner claimed compensation for diminution in the value of his property caused by aircraft traffic landing and taking off directly over the property pursuant to regulations of the Civil Aeronautics Authority. The Court found that the "path of glide" followed by the planes was outside the "navigable airspace which Congress placed within the public domain" under the Air Commerce Act, 44 Stat. 568, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973.[14] It declared not to be "controlling" the fact that enjoyment and use of the land were not "completely destroyed," in view of the fact that the use of the airspace would "limit the utility of the land and cause a diminution in its value." 328 U.S. at 262. Similarly, in *United States* v. *Kansas City Ins. Co.*, *supra*, where a government dam raised the water table and thus soaked certain farm land "sufficiently to destroy its agricultural value," the owner was awarded compensation.

In like manner, the action of the Secretary sustained by the court below nullifies the property rights of these petitioners and countless others under like circumstances who would propose to use their property pursuant to valid grants from the States and the United States. It is thus a taking without compensation in violation of the Fifth Amendment, unless, as held by the court below, the government's action is shielded by its "paramount servitude" over navigable waters and their underlying lands. Because of the inconsistency of the Court of Appeals' holding on this score with past decisions of this Court, and the importance of the question for the private owners of submerged lands throughout the country, review by this Court is urgently required.

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[14] See *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), in which the rule of the *Causby* case was applied notwithstanding the fact that the flights in question were found to be within the "navigable airspace."

3. This Case Is a Good Vehicle for Resolution of the Important Public Issues Involved.

The general issue involved in this case—whether the Secretary is authorized or required to take account of matters other than the effect on navigation, such as considerations of "ecology, and the general public interest," in passing on applications for permits to do work in navigable areas—is an important and continuing subject of public interest.

One aspect of this general issue, arising in a different context, is pending before this Court on the petitions of the Secretary and the State of New York, Nos. 614 and 615. Those petitions seek review of the holding by the Second Circuit at the suit of conservationist groups that the Secretary is required to consider matters other than the effect on navigation (*i.e.*, that the Secretary "should not have ignored the prospect that a 'causeway' . . . was to be a part of the project . . ., and that approval of the Secretary of Transportation would later be required.") *Citizens Committee for the Hudson Valley, et al.* v. *Volpe, et al.*, 425 F.2d 97, 106 (1970).

This petition presents another, and converse, aspect of the general issue—whether the Secretary is authorized to consider ecological factors, again urged by conservationist groups, in derogation of state regulation and of private property rights granted to petitioners by the State of Florida, and by the United States through the Submerged Lands Act. Obviously, the scope of the Secretary's authority over work in navigable areas, and its adjustment with competing considerations of state regulation, authority and ownership rights (both state and private) in inland navigable waters and the marginal seas, need authoritative delineation in the public interest. This case and the *Citizens Committee* case have, for different reasons, blocked work authorized or desired by a State. Together, they offer a broad and complementary opportunity for the needed delineation of the Secretary's

authority—an opportunity in which the general question can be presented and considered in its various and diverse aspects, both from the standpoint of a State (*Citizens Committee*) and a private property owner (this case) who have each been prevented from proceeding.

In addition, the legal issues are sharply focused in this case without complex or contradictory facts, it having been administratively found that petitioners' proposed dredge and fill would "have no material adverse effect on navigation" and petitioners having conceded that there was sufficient evidence to support a "finding that our fill would do damage to the ecology or marine life on the bottom."

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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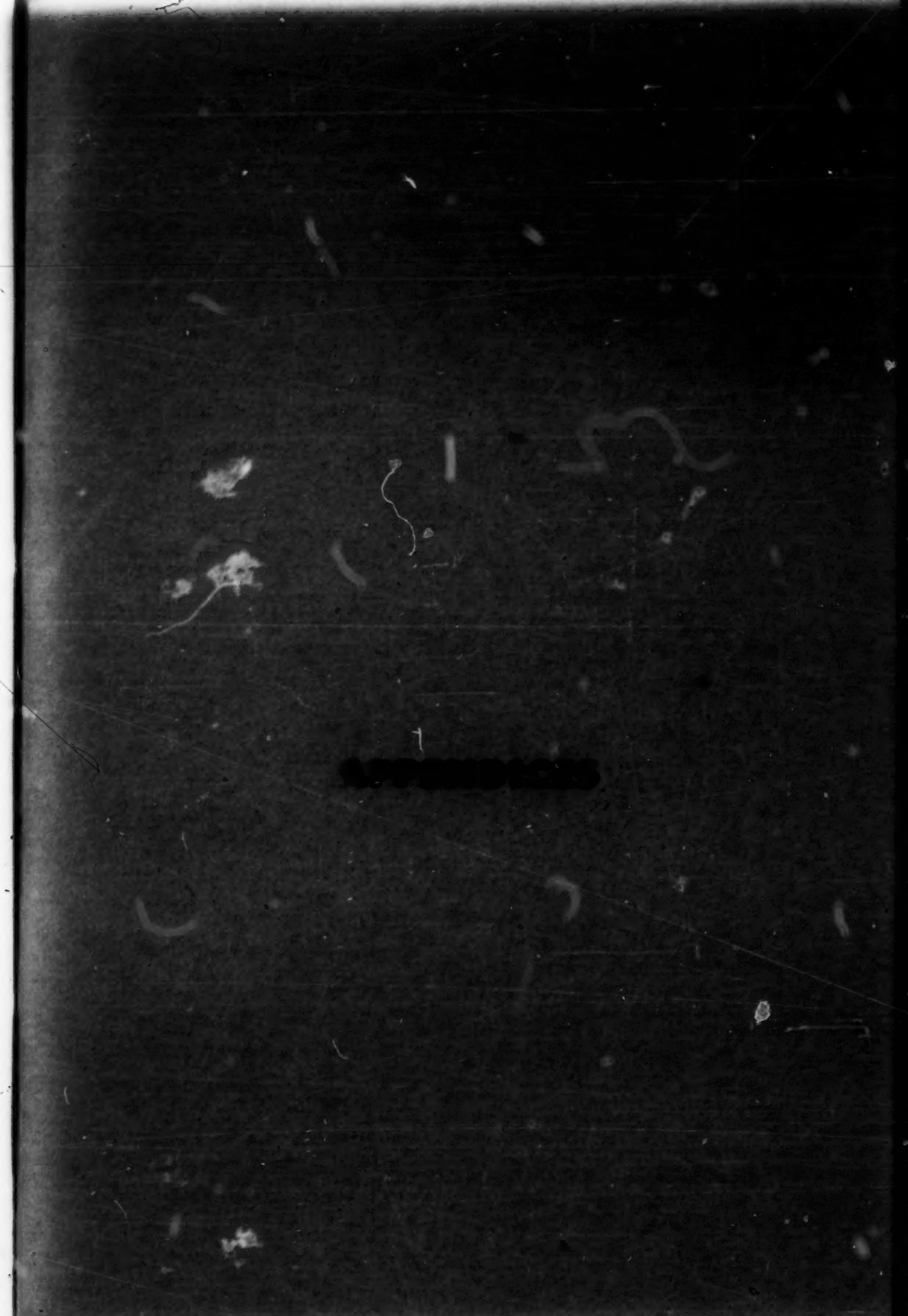

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27555

ALFRED G. ZABEL and DAVID H. RUSSELL,
Plaintiffs-Appellees,

versus

R. P. TABB, COLONEL, CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA, DISTRICT; STANLEY R. RESOR, SECRETARY OF THE ARMY; AND UNITED STATES OF AMERICA,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(July 16, 1970)

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

BROWN, Chief Judge: It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of our environment. By an injunction requiring the issuance of a permit to fill in eleven acres of tidelands in the beautiful Boca Ciega Bay in the St. Petersburg-

Tampa, Florida area for use as a commercial mobile trailer park, the District Judge held that the Secretary of the Army and his functionary, the Chief of Engineers, had no power to consider anything except interference with navigation. There being no such obstruction to navigation, they were ordered to issue a permit even though the permittees acknowledge that "there was evidence before the Corps of Engineers sufficient to justify an administrative agency finding that [the] fill would do damage to the ecology or marine life on the bottom." We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy. We reverse.

I

Genesis: The Beginning

In setting the stage we draw freely on the Government's brief. This suit was instituted by Landholders, Zabel and Russell, on May 10, 1967, to compel the Secretary of the Army to issue a permit to dredge and fill in the navigable waters of Boca Ciega Bay, in Pinellas County near St. Petersburg, Florida. On August 15, 1967, the United States and its officers, Defendants-Appellants, filed a motion to dismiss the suit for lack of jurisdiction which was denied. The United States and other defendants then answered the complaint alleging lack of jurisdiction and that the Court lacks power to compel a discretionary act by the Secretary of the Army. The United States and other defendants moved for summary judgment. Land-

holders, Zabel and Russell, also moved for summary judgment. After a hearing, the District Court, on February 17, 1969, granted summary judgment for Landholders and directed the Secretary of the Army to issue the permit. It granted a stay of execution of the judgment until this appeal could be heard and decided. We invert the summary judgments, reversing Appellees and rendering judgment for the United States.

Landholders own land riparian to Boca Ciega Bay and adjacent land underlying the Bay. It is navigable water of the United States on the Gulf side of Pinellas Peninsula, its length being traversed by the Intracoastal Waterway, which enters Tampa Bay from Boca Ciega Bay and is thus an arm of the Gulf of Mexico. The Zabel and Russell property is located about one mile from the Intracoastal Waterway.

Landholders desire to dredge and fill on their property in the Bay for a trailer park, with a bridge or culvert to their adjoining upland. To this purpose they first applied to the state and local authorities for permission to perform the work and obtained the consent or approval of all such agencies having jurisdiction to prohibit the work, namely Pinellas County Water and Navigation Control Authority (which originally rejected permission, but ultimately issued a permit pursuant to state Court order),[1]

[1] The Authority's denial of a permit was affirmed by the Florida District Court of Appeal in Zabel v. Pinellas County Water & Navigation Control Authority, Fla. Ct. App., 1963 154 So.2d 181. The Supreme Court of Florida reversed that decision because Zabel had been required by the Authority to show that there would be no adverse effect on the public interest, rather than the burden of adverse effect being placed on the Authority. It held that on this record there was insufficient showing of adverse effect, so that denial of a permit would be a taking of property without compensation. It said (p. 381). "In view of the foregoing, the decision appealed from is quashed and the cause remanded for disposition consistent herewith." Zabel v. Pinellas County Water & Nav. Con. Auth., Fla., 1965, 171 So.2d 376. Against the Authority's contention that this ruling intended further proceedings on the application, to

Trustees of the Internal Improvement Fund of the State of Florida, Central and South Florida Flood Control District, and Board of Pilot Commissioners for the Port of St. Petersburg.

Landholders then applied to the Corps of Engineers for a federal permit to perform the dredging and filling. The Pinellas County Water and Navigation Control Authority (which originally rejected permission, but ultimately issued a permit pursuant to state Court order) continued to oppose the work as did the Board of County Commissioners of Pinellas County, who also comprise the Pinellas County Water and Navigation Control Authority, the County Health Board of Pinellas County, the Florida Board of Conservation, and about 700 individuals who filed protests. The United States Fish and Wildlife Service, Department of the Interior, also opposed the dredging and filling because it "would have a distinctly harmful effect on the fish and wildlife resources of Boca Ciega Bay."

A public hearing was held in St. Petersburg in November, 1966, and on December 30, 1966, the District Engineer at Jacksonville, Florida, Colonel Tabb, recommended to his superiors that the application be denied. He said that "The proposed work would have no material adverse effect on navigation" [2] but that:

> "Careful consideration has been given to the general public interest in this case. The virtually unanimous opposition to the proposed work as expressed in the protests which were received and as exhaustively presented at the public hearing have convinced me that approval of the application would not be in the public interest. The continued opposition of the U.S.

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accord it a chance to establish adverse effect, the District Court of Appeal directed issuance of a permit. Pinellas County Water & Nav. Con. Auth. v. Zabel, Fla. Ct. App., 1965, 179 So.2d 370.

[2] There was evidence both that it would aid navigation and that it would obstruct navigation. There was similar evidence on pollution.

> Fish & Wildlife Service despite efforts on the part of the applicants to reduce the extent of damage leads me to the conclusion that approval of the work would not be consistent with the intent of Congress as expressed in the Fish & Wildlife Coordination Act, as amended, 12 August 1958. Further, the opposition of the State of Florida and of county authorities as described in paragraph 5 above gives additional support to my conclusion that the work should not be authorized."

The Division Engineer, South Atlantic Division, Atlanta, Georgia, concurred in that recommendation stating: "In view of the wide spread opposition to the proposed work, it is apparent that approval of the application would not be in the public interest." The Chief of Engineers concurred for the same reasons. Finally, the Secretary of the Army denied the application on February 28, 1967, because issuance of the requested permit:

> 1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,
>
> 2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),
>
> 3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and
>
> 4. Would be contrary to the public interest.

Landholders then instituted this suit to review the Secretary's determination and for an order compelling him to issue a permit. They urged that the proposed work would not hinder navigation and that the Secretary had no authority to refuse the permit on other grounds. They acknowledged that "there was evidence before the Corps of Engineers sufficient to justify an administrative agency finding that our fill would do damage to the ecology or

marine life on the bottom." The Government urged lack of jurisdiction and supported the denial of the permit on authority of § 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U.S.C.A. § 403, giving the Secretary discretion to issue permits and on the Fish and Wildlife Coordination Act of March 10, 1934, 48 Stat. 401, as amended, 16 U.S.C.A. §§ 661 and 662(a) requiring the Secretary to consult with the Fish and Wildlife Service and state conservation agencies before issuing a permit to dredge and fill.

The District Court held that it had jurisdiction, that the Fish and Wildlife Coordination Act was not authority for denying the permit, and that:

> "The taking, control or limitation in the use of private property interests by an exercise of the police power of the government or the public interest or general welfare should be authorized by legislation which clearly outlines procedure which comports to all constitutional standards. This is not the case here.
>
> As this opinion is being prepared the Congress is in session. Advocates of conservation are both able and effective. The way is open to obtain a remedy for future situations like this one if one is needed and can be legally granted by the Congress."

The Court granted summary judgment for Landholders and directed the Secretary of the Army to issue the permit. This appeal followed.

The question presented to us is whether the Secretary of the Army can refuse to authorize a dredge and fill project in navigable waters for factually substantial ecological reasons even though the project would not interfere with navigation, flood control, or the production of power. To answer this question in the affirmative, we must answer two intermediate questions affirmatively. (1) Does Congress for ecological reasons have the power to prohibit a project on private riparian submerged land in navigable waters? (2) If it does, has Congress committed the power to prohibit to the Secretary of the Army?

II

Constitutional Power

The starting point here is the Commerce Clause[3] and its expansive reach. The test for determining whether Congress has the power to protect wildlife in navigable waters and thereby to regulate the use of private property for this reason is whether there is a basis for the Congressional judgment that the activity regulated has a substantial effect on interstate commerce. *Wickard* v. *Filburn*, 1942, 317 U.S. 111, 125, 63 S.Ct. 82, ——, 87 L.Ed. 122, 135. That this activity meets this test is hardly questioned.[4] In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist,[5]

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[3] "The Congress shall have power to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. Const. Art. I, § 8, Cl. 3.

[4] Landholders cite Weber v. State Harbor Comm'rs, 1873, 85 U.S. (18 Wall.) 65, 21 L.Ed. 798 and United States v. River Rouge Improvement Co., 1926, 269 U.S. 411, 46 S.Ct. 144, 70 L.Ed. 339 as limiting the power of the Federal Government over navigable waters to control for navigational purposes. Not surprisingly, the narrow view these cases take of the commerce clause is pre-United States v. Darby, 1941, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609.

[5] Complete documentation of the concern over environmental problems would surely be voluminous, but it is indirectly evidenced by the amount of very recent legal activity. See National Environmental Policy Act of 1969, Pub. Law 91-190 (Jan. 1, 1970), *infra* note 24; *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H. Rep. 91-917, 91st Cong., 2d Sess, March 18, 1970, *infra* text at note 26; Executive Order 11507, Feb. 4, 1970, 38 L.W. 2436; United States v. Ray, 5 Cir., 1970, —— F.2d —— [No. 27888, Jan. 22, 1970]; E.B. Elliott Advertising Co. v. Hill, 5 Cir., 1970, —— F.2d —— [No. 27589, April 3, 1970]; Citizens Committee for the Hudson Valley v. Volpe, S.D.N.Y., 1969, 302 F. Supp. 1083, aff'd, 2 Cir., 1970, —— F.2d —— [No. 428-33, April 16, 1970]; National Advertising Co. v. Monterey, Calif., 1970, —— Calif. Rptr. —— [38 L.W. 2433, Jan. 30, 1970]; MacGibbon v. Duxbury Board of Appeals, Mass., 1970, —— N.E.2d —— [38 L.W. 2429, Jan. 29, 1970]; California v. SS Bournemouth, C.D. Cal., 1969, 307 F. Supp. 922; Creation of ABA Special Committee on Environmental Quality, 15 Am. Bar News No. 3, March 1970.

the nation knows, if Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce. Landholders do not contend otherwise. Nor is it challenged that dredge and fill projects are activities which may tend to destroy the ecological balance and thereby affect commerce substantially. Because of these potential effects Congress has the power to regulate such projects.

III

Relinquishment of the Power

Landholders do not challenge the existence of power. They argue that Congress in the historic compromise over the oil rich tidelands controversy abandoned its power over other natural resources by the relinquishment to the states in the Submerged Lands Act.[6] By it they urge the Government stripped itself of the power to regulate tidelands property except for purposes relating to (i) navigation, (ii) flood control, and (iii) hydroelectric power. This rests on the expressed Congressional reservation of control for these three purposes over the submerged lands, title to and power over which Congress relinquished to the states.[7]

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[6] 43 U.S.C.A. § 1301, et seq. See Continental Oil Co. v. London Steamship Owners' Mut. Ins. Ass'n., 5 Cir., 1969, 417 F.2d 1030, —— A.M.C. ——, *cert. denied*, 1970, —— U.S. ——, —— S.Ct. ——, 25 L.Ed.2d 92, —— A.M.C. ——; Atlantis Development Corp. v. United States, 5 Cir., 1967, 379 F.2d 818.

[7] The relinquishing provision states, 43 U.S.C.A. § 1311 (a) and (b):

> "(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and

The argument assumes that when Congress relinquished title to the land and the right and power to manage and use the land, it relinquished its power under the commerce clause except in particulars (i), (ii), and (iii). It also assumes that reservation of these three enumerated aspects of the commerce power implied that Congress gave up its plenary power over the myriad other aspects of commerce. See, e.g., *Heart of Atlanta Motel, Inc.* v. *United States*, 1964, 379 U.S. 241, 58 S.Ct. 348, 13 L.Ed.2d. 258; *Katzenbach* v. *McClung*, 1964, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290.

A nice argument can be contrived that the net effect of these provisions was to vest in the adjacent states [1] title in these tidelands and their natural resources and [2] [a] the exclusive power to use, exploit and manage

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assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources * * *."

The reservation provision referred to states, 43 U.S.C.A. § 1311 (d):

"(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power * * *."

The term "natural resources" is broadly defined to include both the animate and inanimate:

"The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;"

43 U.S.C.A. § 1301 (e)

these lands [b] only subject to the reserved power of the Federal government regarding (i) navigation, (ii) flood control, and (iii) production of power. Certainly, this brief synopsis of (1) and (2) (a) is the literal import of § 1311 (a) (1) (2). Likewise, the reservation summarized as (2) (b) is literally specified in § 1311 (d). On this approach, the Federal Government turned over to adjacent states the full management and use of the tidelands reserving only those limited powers over commerce comprehended within the three particulars.

But this argument ignores both language found elsewhere and the legislative purpose of the Act. The controversy, often pressed with emotional overtones, was over oil and gas and whether the states were to reap the economic benefits of development royalties and to regulate the exploration and development or whether these benefits and these controls were to be exercised by the Federal Government as an adjunct of then newly declared "paramount rights", *United States* v. *California*, 1947, 332 U.S. 804, 805, 68 S.Ct. 20, ——, 92 L.Ed. 382, 383. The Act and this relinquishment reflect the legislative compromise found in the combination of the Submerged Lands Act and the Outer Continental Shelf Act.[8] The adjacent states were to be the "owner" of the resources and reap exclusively the economic benefits of resources in the tidelands and have full control over management and exploitation. The Federal government, on the other hand, was given exclusive ownership and control *vis-a-vis* the states in the Outer Continental Shelf.

Although it was easy to make this division, the nature of the physical area of the controversy presented immediate operational problems growing out of the water. The Federal government's traditional concern with navigation, especially on the high seas, its later but then quite extensive concern in flood controls, hydroelectric power production, and the frequent combination of both under gran-

[8] 43 U.S.C.A. § 1331, et. seq.

diose projects of a Corps of Engineers, raised specific problems calling for accommodation of the (i) sweeping Federal divestiture and (ii) the continued fulfillment of the Federal government's role in these activities. Thus, for example, the states' exclusive right to grant exploration privileges, determine the location and spacing of development wells or drilling platforms posed prospects of maritime hazards. Without imposing its own notions of how development ought to be conducted, restricted, expanded, or controlled, the Federal government had to have, and reserved expressly this power even to prohibit a drilling rig platform at a particular location. These specific reservations eliminated these frequent and extensive activities as a source of further state versus national controversy.

Whatever remaining doubt there might be on this reading was expressly eliminated by language in § 1314(a) which specifically retains in the Federal government "all of its * * * rights in and powers of regulation and control of said lands and * * * waters for the constitutional purposes of commerce * * *" 43 U.S.C.A. § 1314(a).[9] This section, which encompasses and pervades the entire Act, makes it clear that Congress intended to and did retain all its constitutional powers over commerce and did not relinquish certain portions of the power by specifically reserving others.[10]

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[9] "The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title."

43 U.S.C.A. § 1314 (a).

[10] It is argued that the retention in § 1314(a) is limited to the three aspects enumerated in § 1311(d) by the words "[the commerce power] shall be paramount to, but shall not be deemed to

All of this is additionally borne out by the legislative history[11] and *United States* v. *Rands*, 1967, 389 U.S. 121, 127, 88 S.Ct. 265, ——, 19 L.Ed.2d 329, 335:

> "Finally, respondents urge that the Government's position subverts the policy of the Submerged Lands Act, which confirmed and vested in the States title to the lands beneath navigable waters within their boundaries and to natural resources within such lands and waters, together with the right and power to manage, develop, and use such lands and natural resources. However, reliance on that Act is misplaced, for it expressly recognized that the United States retained all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights

include [relinquished rights]." But we have already shown that the enumeration of these three, which are explicitly stated because they are particularly relevant to the regulation of land lying under navigable waters, does not imply that Congressional power over other types of commerce was among the rights relinquished. Because Congress did not give up any of its power over all of interstate commerce in § 1311 (see note 7, *supra*), they are not "[relinquished rights]" and the limitation portion of § 1314(a) is inapplicable.

To hold otherwise would render the reservation of constitutional commerce power in § 1314(a) a useless reiteration of the impliedly retained powers in § 1311(d). But to hold that it is an explicit reservation of all commerce powers gives the section meaning. The section may be unneeded and overly cautious in that it reserves a constitutional power that has never been relinquished, but it should not be read in such a way as to render it otherwise useless.

[11] "This title does not affect any of the Federal constitutional powers of regulation and control over these areas within State boundaries. Such powers, as those over navigation, commerce, national defense, international affairs, flood control, and power production where the United States owns or acquires the water power."

H. R. Rep. No. 215, 83d Cong., 1st Sess. (March 27, 1953), 1953 U.S.C.C. & A.N. 1385, 1389.

> of ownership . . . . Nothing in the Act was to be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power. The Act left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them."

Congress clearly has the power under the Commerce Clause to regulate the use of Landholders' submerged riparian property for conservation purposes and has not given up this power in the Submerged Lands Act.

IV

Prohibiting Obstructions to Navigation

The action of the Chief of Engineers and the Secretary of the Army under attack rests immediately on the Rivers and Harbors Act, 33 U.S.C.A. § 403, which declares that "the creation of any obstruction * * * to the navigable capacity of any of the waters of the United States is prohibited." [12] The Act covers both building of structures and the excavating and filling in navigable waters. It is struc-

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[12] "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity, of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

33 U.S.C.A. § 403.

tured as a flat prohibition *unless*—the unless being the issuance of approval by the Secretary after recommendation of the Chief of Engineers.[13] The Act itself does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit to one seeking to build structures on or dredge and fill his own property. Although the Act has always been read as tempering the outright prohibition by the rule of reason against arbitrary action, the Act does flatly forbid the obstruction. The administrator may grant permission on conditions and conversely deny permission when the situation does not allow for those conditions.

But the statute does not prescribe either generally or specifically what those conditions may be. The question for us is whether under the Act the Secretary may include conservation considerations as conditions to be met to make the proposed project acceptable. Until now there has been no absolute answer to this question. In fact, in most cases under the Rivers and Harbors Act the Courts have been faced only with navigation problems." [sic] See, e.g., *Sanitary Dist.* v. *United States*, 1925, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352; *Wisconsin* v. *Illinois*, 1929, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426; *United States* v. *Republic Steel Corp.*, 1960, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903.

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[13] This Court recently held that under this same section together with the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1333(f), a permit must be obtained before a project can be begun on the Outer Continental Shelf. United States v. Ray, *supra*, note 5, which followed the remand and trial on the merits in Atlantis Development Corp. v. United States, 5 Cir., 1967, 379 F.2d 818.

[14] Landholders cite authority holding that the Secretary is empowered to deny a permit only for navigational reasons, United States Attorney General's opinion of February 13, 1925, 30 U.S. Atty. Gen. Ops. 410 at 412, 415, 416; Miami Beach Jockey Club, Inc. v. Dern, D.C. Cir., 1936, 86 F.2d 135, 136 (on petition for rehearing). These determinations, by no means inexorable under the wording of the statute, see Greathouse v. Dern, *infra*, pre-date

One very big exception is *United states ex rel. Greathouse* v. *Dern*, 1933, 289 U.S. 352, 53 S.Ct. 614, 77 L.Ed. 1250. There petitioners sought a writ of mandamus to compel the Secretary of War and the Chief of Engineers to issue a permit to build a wharf in navigable waters. The

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the changes wrought by the Fish and Wildlife Coordination Act, *infra*.

And they are out of step with the sweeping declaration of power over commerce in United States v. Appalachian Electric Power Co., 1940, 311 U.S. 377, 423-27, 61 S.Ct. 291, ——, 85 L.Ed. 243, 261-63:

> "The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."
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> "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. * * * That authority is as broad as the needs of commerce. * * * The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters."

Secretary, specifically finding that it would not interfere with navigation, denied the permit. The Supreme Court held that mandamus would not issue because the allowance of mandamus "is controlled by equitable principles * * * and it may be refused for reasons comparable to those which would lead a Court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right." The reason was that the United States had plans to condemn petitioners' land for use as a means of access to a proposed parkway. Allowing a wharf to be built would increase the expense to the government since it would increase the market value of the land and would require the government to pay for tearing down the wharf. The importance of *Greathouse* is that it recognized that the Corps of Engineers does not have to wear navigational blinders when it considers a permit request. That there must be a reason does not mean that the reason has to be navigability.

Another case holds that the Corps has a duty to consider factors other than navigational. *Citizens Committee for the Hudson Valley* v. *Volpe*, S.D.N.Y., 1969, 302 F.Supp. 1083, aff'd., 2 Cir., 1970 —— F.2d —— [No. 428-33, April 16, 1970]. There the District Court held that the Corps must consider a fill project in the context of the entire expressway project of which it was a part rather than just considering the fill and its effect on navigation. The reasoning was that the approval of the Secretary of Transportation was necessary before a proposed causeway could be constructed. The causeway, along with the fill, was an integral part of the expressway project. However, if the Corps and Secretary of the Army approved the fill and the State completed it, the Secretary of Transportation, considering the enormous expense of the fill, would have no choice, other than approving the causeway. The Army thus had exceeded its authority in approving the fill on only navigational considerations since

approval of the fill was effectually approval of the causeway.[15]

But such circuity is not necessary. Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies. And here the government-wide policy of environmental conservation is spectacularly revealed in at least two statutes, The Fish and Wildlife Coordination Act[16] and the National Environmental Policy Act of 1969.[17]

The Fish and Wildlife Coordination Act[18] clearly re-

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[15] The Court essentially held that the Corps, where approval of Transportation is also required, cannot be oblivious to the effect of fill projects on the beauty and conservation of natural resources. This inference arises from the fact that the Secretary of Transportation is statutorily required to consider conservation before granting a permit. But if the fill on which the causeway was to be built were completed at the time the permit for the causeway was requested, there would be no conservation factors for Transportation to consider. The Court held that the Corps could not blind itself to this fact and thereby cut off considerations of conservation by granting a fill permit without Transportation's approval of the causeway.

[16] 16 U.S.C.A. §§ 661-666.

[17] Public Law 91-190, 42 U.S.C.A. §§ 4331-47.

[18] The Fish and Wildlife Coordination Act states:

"Except as hereafter stated in subsection (h) of this section [not applicable], whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and

quires the dredging and filling agency (under a governmental permit), whether public or private, to consult with the Fish and Wildlife Service,[19] with a view of conservation of wildlife resources. If there be any question as to whether the statute directs the licensing agency (the Corps) to so consult it can quickly be dispelled. Common sense and reason dictate that it would be incongruous for Congress, in light of the fact that it intends conservation to be considered in private dredge and fill operations (as evidenced by the clear wording of the statute), not to direct the only federal agency concerned with licensing such projects both to consult and to take such factors into account.

The second proof that the Secretary is directed and authorized by the Fish and Wildlife Coordination Act to consider conservation is found in the legislative history. The Senate Report on the Fish and Wildlife Coordination Act states:

> "Finally, the nursery and feeding grounds of valuable crustaceans, such as shrimp, as well as the young of valuable marine fishes, may be affected by dredging, filling, and diking operations often carried out to improve navigation and provide new industrial or residential land.
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> Existing law has questionable application to projects of the Corps of Engineers for the dredging of bays and estuaries for navigation and filling purposes. More seriously, existing law has no application whatsoever to the dredging and filling of bays and

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damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development."

16 U.S.C.A. § 662(a).

[19] Presumably Landholders must first obtain the Corps of Engineers permit before becoming a "private agency under Federal permit or license."

> estuaries by private interests or other non-Federal entities in navigable waters under permit from the Corps of Engineers. This is a particularly serious deficiency from the standpoint of commercial fishing interests. The dredging of these bays and estuaries along the coastlines to aid navigation and also to provide land fills for real estate and similar developments, both by Federal agencies or other agencies under permit from the Corps of Engineers, has increased tremendously in the last 5 years. Obviously, dredging activity of this sort has a profound disturbing effect on aquatic life, including shrimp and other species of tremendous significance to the commercial fishing industry. The bays, estuaries, and related marsh areas are highly important as spawning and nursery grounds for many commercial species of fish and shellfish." [20]

S. Rep. No. 1981, 85th Cong. 2d Sess. (July 28, 1958). 1958 U.S.C.C. & A.N. 3446, 3448, 3450. This Report clearly shows that Congress intended the Chief of Engineers and Secretary of the Army to consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation.

This interpretation was judicially accepted in *Udall* v. *FPC:*

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[20] The Senate Report also shows how the exercise of the commerce power in the conservation arena ties in with its exercise in other areas:

> "The amendments proposed by this bill would remedy these deficiencies and have several other important advantages. The amendments, would provide that wildlife conservation shall receive equal consideration with other features in the planning of Federal water resource development programs. This would have the effect of putting fish and wildlife on the basis of equality with flood control, irrigation, navigation, and hydroelectric power in our water resource programs, which is highly desirable and proper, and represents an objective long sought by conservationists of the Nation."

1958 U.S.C.C. & A.N. at 3450.

> "Section 2(a), 16 USC § 662(a), provides than an agency evaluating a license under which 'the waters of any stream or other body of water are proposed . . . to be impounded first shall consult with the United States Fish and Wildlife Service, Department of the Interior . . . with a view to the conservation of wildlife resources by preventing loss of and damage to such resources . . . . Certainly the wildlife conservation aspect of the project must be explored and evaluated."

1967, 387 U.S. 428, 443-44, 87 S.Ct. 1712, ——, 18 L.Ed.2d 869, 879.

The meaning and application of the Act are also reflected by the actions of the Executive that show the statute authorizes and directs the Secretary to consult with the Fish and Wildlife Service in deciding whether to grant a dredge and fill permit.

In a Memorandum of Understanding[21] between the

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[21] "POLICIES

1. It is the policy of the two Secretaries that there shall be full coordination and cooperation between their respective Departments on the above responsibilities at all organizational levels, and it is their view that maximum efforts in the discharge of those responsibilities, including the resolution of differing views, must be undertaken at the earliest practicable time and at the field organizational unit most directly concerned. Accordingly, District Engineers of the U.S. Army Corps of Engineers shall coordinate with the Regional Directors of the Secretary of the Interior on fish and wildlife, recreation, and pollution problems associated with dredging, filling, and excavation operations to be conducted under permits issued under the 1899 Act in the navigable waters of the United States, and they shall avail themselves of the technical advice and assistance which such Directors may provide.

2. The Secretary of the Army will seek the advice and counsel of the Secretary of the Interior on difficult cases. If the Secretary of the Interior advises that proposed operations will unreasonably impair natural resources or the related environment, including the fish and wildlife and recreational values thereof, or will reduce the quality of such waters in violation of applicable water quality standards, the Secretary of the

Secretary of the Army and the Secretary of the Interior, it is provided that, upon receipt of an application for a permit to dredge or fill in navigable waters, the District Engineer of the Corps of Engineers concerned is required to send notices to all interested parties, including the appropriate Regional Directors of the Federal Water Pollution Control Administration, the Fish and Wildlife Service, the National Park Service and the appropriate state conservation, resources, and water pollution agencies. The District Engineer is given the initial responsibility of evaluating all relevant factors in reaching a decision as to whether the particular permit involved should be granted or denied. The Memorandum also provides that in case of conflicting views the ultimate decision shall be made by the Secretary of the Army after consultation with the Secretary of the Interior.

This Executive action has almost a virtual legislative imprimatur from the November 1967 Report of the House Committee on Merchant Marine and Fisheries, in reporting favorably on a bill [22] to protect estuarine areas which was later enacted into law.[23] As a result of the effective operation of the Interdepartmental Memorandum of Un-

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Army in acting on the request for a permit will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage, including all data presented by the Secretary of the Interior, and will either deny the permit or include such conditions in the permit as he determines to be in the public interest, including provisions that will assure compliance with water quality standards established in accordance with law. * * *."

[22] H. Rept. 989, 90th Cong., 1st sess., to accompany H.R. 25, pp. 4-5. See also S. Rept. No. 1419, July 17, 1968, 90th Cong., 2d sess., Senate Committee on Commerce, reporting on S. 695 and H.R. 25, pp. 13-14. H.R. 25 with revisions became the Act of August 3, 1968, 82 Stat. 625 (Pub. L. 90-454).

[23] "As a result of the hearings and the discussions which ensued from the circularized draft proposal—particularly with respect to the permit provision for dredging, filling, and excavation—a memorandum of understanding was entered into between the Secretary of the Interior and the Secretary of the Army. This

derstanding, the Interior Department and the Committee concluded that it was not necessary to provide for dual permits from Interior and Army.

The intent of the three branches has been unequivocally expressed: The Secretary must weigh the effect a dredge and fill project will have on conservation before he issues a permit lifting the Congressional ban.

The parallel of momentum as the three branches shape a national policy gets added impetus from the National Environmental Policy Act of 1969, Public Law 91-190, 42 U.S.C.A. §§ 4331-47. This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment.[24]

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agreement set forth the policies and procedures to be followed regarding the control of dredging, filling, and excavation in the navigable waters of the United States, which would include many of our Nation's estuarine areas.

On August 2, the Department of the Interior filed a supplemental report on the bill. In its report to the committee, the Department stated that we believe that this memorandum of understanding provides an effective administrative solution to the problem of preventing unreasonable impairment of the natural resources of the Nation's waterways and related environment, and preventing the pollution of the waters. In our opinion, the agreement makes the legislative approach set forth in H.R. 25 . . . for control for dredging, et cetera, unnecessary . . . (Omissions by the Committee.)"

[24] Its newness, relevance and significance warrants reproduction in full.

"This Act may be cited as the 'National Environmental Policy Act of 1969'.

PURPOSE

Sec. 2 The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural re-

sources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

[Footnote continued on page 44]

[24] [Continued]

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consolidation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and order major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as

provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative use of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies."

Public Law 91-190, Title I, 83 Stat. 852.
42 U.S.C.A. §§ 4331-47.

Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today. The national policy is set forth in plain terms in § 101 and the disclaimer of § 104(3) neither affects it nor the duty of all departments to consider, consult, collaborate and conclude. For we hold that while it is still the action of the Secretary of the Army on the recommendation of the Chief of Engineers, the Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors. In rejecting a permit on non-navigational grounds, the Secretary of the Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors.[25]

To judge the ebb and flow of the national tide, he can look to the Report of the House Committee on Government Operations. Although this perhaps lacks traditional standing of legislative history, it certainly has relevance somewhat comparable to an Executive Commission Report. On March 17, 1970, it approved and adopted a Report,[26]

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[25] For like reasons the following disclaimer in the Fish and Wildlife Act of 1956, 70 Stat. 119, 16 U.S.C.A. §§ 741-754, specifically 70 Stat. 1124, 16 U.S.C.A. § 742i is not decisive:

> "The rights of States.—Nothing in this Act (subsection 742a and note—742d, 742e-742j of this title; 15 subsection 713c-3 and note) shall be construed (1) to interfere in any manner with the rights of any State under the Submerged Lands Act (Public Law 31, Eighty-third Congress) (43 subsection 1301 and notes—1303, 1311-1315) or otherwise provided by law, or to supersede any regulatory authority over fisheries exercised by the States either individually or under interstate compacts;"

[26] The heading of the Report reads:

> "The Corps of Engineers, which is charged by Congress with the duty to protect the nation's navigable waters, should, when considering whether to approve applications for landfills, dredg-

based on a study made by its Conservation and Natural Resources Subcommittee, entitled *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution.* (H. Rep. No. 91-917, 91st Cong. 2d Sess. (1970)) The first section stifles any doubt as to how this part of Congress construes the Corps' duty under the Rivers and Harbors Act. The section traces the historical interpretation of the Corps' power under the Rivers and Harbors Act. It commends the Corps for recognizing ecological considerations under the Act to protect against unnecessary fills and cites the instant case.[27] But following the temper of the times, the report by bold face black type cautions against any easy overconfidence and charges the Corps with ever-increasing vigilance.[28]

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ing and other work in navigable waters, increase its consideration of the effects which the proposed work will have, not only on navigation, but also on conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway."

[27] "In 1968, the Corps revised its regulations to state that the Corps, in considering an application for a permit to fill, dredge, discharge or deposit materials, or conduct other activities affecting navigable waters, will evaluate "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, esthetics, ecology, and the general public interest." 33 CFR 209.120(d)(1).[4] The Corps applied this policy when it recently rejected the efforts of land developers to fill in a major part of Boca Ciega Bay, near St. Petersburg, Fla. See *Zabel* v. *Tabb*, 296 F. Supp. 764 (D.C. M.D. Fla., Tampa Div., Feb. 17, 1969), now on appeal to the U.S. Court of Appeals, Fifth Circuit, No. 27555.

The committee commends the Corps for recognizing its broader responsibilities to protect against unnecessary fills and other alteration of water bodies. * * *"

H. Rep. No. 91-917, p. 5.

[28] "The Corps of Engineers should instruct its district engineers and other personnel involved in considering applications for fills, dredging, or other work in estuaries, rivers, and other bodies of navigable water to increase their emphasis on how the work will affect all aspects of the public interest, including

When the House Report and the National Environmental Policy Act of 1969 are considered together with the Fish and Wildlife Coordination Act and its interpretations, there is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act.

V

Due Process

Landholders next contend that the denial of a permit without a hearing before the Fish and Wildlife Service is a deprivation of property without due process of law. Administrative law requires that before an agency can regulate a party, it must allow that party to be heard. Here, Landholders were given such a hearing before the Corps of Engineers, the body empowered to grant or deny a permit. They were not entitled to a hearing before the Fish and Wildlife Service because it is not "the one who decides." *Morgan* v. *United States*, 1935, 289 U.S. 468, 481, 56 S.Ct. 906, 912, 80 L.Ed. 1288, 1295. They were allowed to rebut the findings and conclusions of the Fish and Wildlife Service before the deciding body and thus were not denied due process for lack of a hearing.

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not only navigation but also conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway."

H. Rep. No. 91-917.

As the Committee views it, not only should the Corps consider conservation, but it should consider conservation to be endangered by every dredge and fill project and place the burden of proving otherwise on the applicant. See, e.g., the conclusion of the first section of the Report and its bold face type recommendation:

"The Corps of Engineers should permit no further landfills or other work in the Nation's estuaries, rivers and other waterways except in those cases where the applicant affirmatively proves that the proposed work is in accord with the public interest, including the need to avoid the piecemeal destruction of these water areas."

H. Rep. No. 91-917, p. 6.

VI

Taking Without Compensation

Landholders' last contention is that their private submerged property was taken for public use without just compensation. They proceed this way: (i) the denial of a permit constitutes a taking since this is the only use to which the property could be put; (ii) the public use is as a breeding ground for wildlife; and (iii) for that use just compensation is due.

Our discussion of this contention begins and ends with the idea that there is no taking. The waters and underlying land are subject to the paramount servitude in the Federal government which the Submerged Lands Act expressly reserved as an incident of power incident to the Commerce Clause. (See Part II *supra*).

VII

Conclusion

Landholders' contentions fail on all grounds. The case is reversed and since there are no questions remaining to be resolved by the District Court, judgment is rendered for the Government and the associated agent-defendants.

REVERSED and RENDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

No. 67-200 Civ. T.

[Filed February 17, 1969]

ALFRED G. ZABEL and DAVID H. RUSSELL,
Plaintiffs,

vs.

R. P. TABB, Colonel, Corps of Engineers, District Engineer, Department of the Army, Jacksonville, Florida, District; and STANLEY R. RESOR, Secretary of the Army, and UNITED STATES OF AMERICA,
Defendants.

OPINION

This case involves Section 10 of the Rivers and Harbors Act, 1899, 30 Stat. 1151, 33 U. S. C. 403 (1964) and the Fish and Wildlife Coordination Act of 1958, 48 Stat. 401, as amended, 16 U. S. C. 661, et seq. (1964).

The parties suggest and research of the court indicates that is is [sic] a case of first impression.

Plaintiffs applied for Department of the Army permit to dredge and fill in navigable waters under Section 9 of the Rivers and Harbors Act. Defendants denied the application and plaintiffs seek relief in one of several ways.

After denial of motion for lack of jurisdiction the court heard at pretrial conference motions for summary judgment by plaintiffs and defendants, respectively. Having considered the papers submitted and excellent memoranda and argument the court enters summary judgment for plaintiffs for the reasons given.

FACTS

There is no issue as to the following:

1. Title of plaintiffs to the submerged land and all questions concerning the interest of plaintiffs and the public, respectively, under the laws of the State of Florida were considered and decided in favor of plaintiffs in *Zabel and Russell* v. *Pinellas County Water and Navigation Control Authority*, 171 So. 2d 376.

2. As required by the rule in *Cummings* v. *Chicago*, 188 U. S. 410, plaintiff obtained consent or approval from all local agencies having jurisdiction to prohibit the work on a state level, to-wit: Pinellas County (Fla.) Water and Navigation Control Authority, Trustees of the Internal Improvement Fund of the State of Florida, Central and South Florida Flood Control District, and Board of Pilot Commissioners for the Port of St. Petersburg (Pinellas County, Florida).

3. The United States District Engineer, who heard the application at public hearing found:

> "2. Location of proposed work: Boca Ciega Bay, Pinellas County, near St. Petersburg, Florida. The area in question is located approximately a mile from the channel of the Intracoastal Waterway, Caloosahatchee River to Anclote River, Florida."
>
> "4. Character of proposed work: The proposed work consists of the construction of a bulkhead and bridge and to dredge and fill; the dredged material to be deposited inside the bulkhead to form an island in Boca Ciega Bay at applicants' property lying east of Pasadena Avenue, South, in a portion of Section 25, Township 31S, Range 15 E, and Section 30, Township 31S, Range 16E, Pinellas County, Florida. The alternate plan submitted with Tab 2 to Inclosure 5 would reduce the size of the fill and of the dredging area, and provide a culvert instead of a bridge."

"5. a. The Pinellas County Water and Navigation Control Authority permit (Tab 23 to Inclosure 6) was issued pursuant to a court order from the Florida Circuit Court having jurisdiction."

b. The work is opposed by the Board of County Commissioners of Pinellas County."

c. The work is opposed by the County Health Board of Pinellas County,"

d. Both the original and the alternate plans are opposed by the U. S. Fish & Wildlife Service."

"6. The work is opposed by the Florida Board of Conservation."

"7. Views of District Engineer concerning probable effect on:

"a. Navigation, present or prospective: The proposed work would have no material adverse effect on navigation. The surrounding waters are quite shallow and able to support only limited light draft local boating. Although the proposed fill would improve water depths in the immediate area. Since the fill material would be taken from the bay bottoms and placed at elevations extending above the water line, the total volume of tidal flow into and out of Boca Ciega Bay would not be reduced. Although numerous other fills which have been placed in Boca Ciega Bay in the last 15 years have unquestionably created blockages to navigation in certain areas; the dredging which has been performed to create the fills has also improved navigation conditions in the same area."

"b. Harbor Lines: No harbor lines have been established and none are anticipated in the area."

"c. Flood heights and drift: The work would have no effect."

"d. Beach erosion or accretion: The work would have no effect."

"a. Fish and wildlife resources: The evidence presented by the U. S. Fish & Wildlife Service in correspondence and at the public hearing, together with evidence presented by numerous other persons at the hearing, clearly indicates that the work would have a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay."

(References are to paragraphs First Endorsement of District Engineer to the report which ultimately reached the Secretary of the Army. Exhibit B, Memoranda of Defendants, filed November 24, 1967).

4. The Secretary of the Army, in denying the application, found that issuance of the permit:

"1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,

"2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662,)

"3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and

"4. Would be contrary to the public interest."

(Paragraph a. 4th Indorsement, Memorandum of Defendants, filed November 24, 1967.)

5. At pretrial, plaintiffs stipulated:

"—that there was evidence before the Corps of Army Engineers sufficient to justify an administrative agency finding that our fill would do damage to the ecology or the marine life on the bottom."

6. Plaintiffs contend and defendants have admitted in discovery proceedings that the District Engineer found:

"That the proposed work would have no material adverse effect on navigation."

OPINION

The rule is well established that a court may not overturn a determination of an administrative agency upon a question committed to the agency's judgment unless such agency's "findings were contrary to law, were arbitrary or capricious, or were unsupported by substantial evidence. . . ." *General Motors Corp.* v. *U. S.*, 324 F. 2d 604 (1963).

Thus, the threshhold question is whether the action of the Secretary was within the discretion committed to his judgment.

Section 10 of the Rivers and Harbors Act provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited, and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to the beginning of same. 30 Stat. 1151, 33 U. S. C. 403 (1964)."

Clearly this section vests discretionary authority to deny a permit "to build or commence the building of any . . . bulkhead . . . or other structure . . . in any . . . navi-

gable . . . water of the United States" upon adequate findings supported by substantial evidence that work would obstruct the navigable capacity of any such waters. Here the findings were to the opposite effect.

Defendants urged that the Fish and Wildlife Coordination Act vests supplemental discretionary authority in the Secretary of the Army so that when read in para materia he can deny such a permit upon findings other than those relating to navigation. Sections 662 (a), (b), (h) of the Fish and Wildlife Coordination Act are as follows:

> (a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream of other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular state wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resources development. 16 U.S.C. 662(a)."
>
> (b) In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the

possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power by administrative action or otherwise, (1) to authorize the construction of water resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which section 661-666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits."

(h) The provisions of sections 661-666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands

under their jurisdiction. Mar. 10, 1934, c. 55, § 2, 48 Stat. 401; 1939 Reorg. Plan No. II § 4(c), (f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; Aug. 14, [illegible], c. 965, 60 Stat. 1080; Aug. 12, 1958, Pub. L. 85-624, § 2, 72 Stat. 564."

An analysis of the quoted portions of Section 662 indicates:

(1) That it relates to any body of water being modified for any purpose by any agency of the Federal Government or by anyone under Federal permit.

(2) It requires the department or agency to "consult" with conservation agencies of the Federal and State governments before proceeding with any Federal project with a view toward "determining means and measures that shall be adopted to prevent the loss of or damage to such wildlife resources," and requires that reports of such conservation agencies "shall be made an integral part of any report prepared or submitted by any agency of the federal government . . . when such reports are submitted to the Congress . . . or to any agency . . . having the authority by administrative action . . . to authorize the construction of water resource development projects . . . ."

"The reporting officers in project reports of the Federal agencies shall give full consideration to the recommendations of the (conservation interests) . . . or the wildlife aspects of such projects and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits."

"The provisions of . . . (the quoted sections) shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundment is less than 10 acres . . . ."

Defendants cite a portion of the legislative history of the 1958 amendment incorporated in those sections as

found in Senate Report 1981, 85 Congress, Second Session, accompanying the amendment bill HR 13138, as reported in 1958 U. S. C. Cong. and ADM News, page 3451 as follows:

> "The legislation would be a permissive law so far as it concerns relationship between water project construction agencies and fish and wildlife conservation agencies. The latter would not be given any veto power over any part of the water resources development program. 1958 U.S. Code Cong. and Adm. News, p. 3451."

and argued that while there is no veto power in the Fish & Wildlife Service that the Corps of Engineers may, in the exercise of its discretion, determine that fish and wildlife consideration are so important as to deny an application on a basis of unreasonableness or to protect "the public interest."

Thus it appears that the quoted sections attempt to cover generally a wide scope of activities with the emphasis on large Federal projects and upon the modification thereof to protect wildlife with little if any attention to clear authority or procedure to be followed where private projects are concerned. It is interesting to note that under defendant's theory the agency having "veto power" is not the one having the expertise in conservation matters but is the agency having specific authority under other legislation to undertake or approve water projects, who defendants suggest are enjoined to "consult with" and "give full consideration to" the reports of the conservation agencies.

This is the authority claimed by the defendants here in denying by the exercise of the police power of the Federal Government the right of private individuals to use property to which their ownership is not contested, in a way admittedly not otherwise prohibited by law.

In this case the District Engineer held a public hearing after which he made findings and recommended denial of the application for a permit without additional hearing or information. Three additional individuals in the Corps of Engineers chain of command confirmed his recommendations by indorsement and eventually the Secretary of the Army denied the application upon the same findings and for the same reasons.

Defendants suggest the applicability of *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967). Since great emphasis is placed thereon it will be discussed in some detail. Advocates of private and public power projects contested their respective rights to a license from the commission. After long and extended hearing before an examiner the Federal Power Commission affirmed the recommendations of the examiner that the private power companies receive a license to construct hydro-electric power projects at High Mountain Sheep on the Snake River in the Pacific Northwest. The Court of Appeals approved the action, 358 F. 2d 804. (A.C.D.C.) and the Supreme Court granted certiorari, 335 U.S. 926, a divided court reversed directing remand to the Commission. Mr. Justice Douglas wrote the majority opinion, Mr. Justice Harlan dissented with an opinion in which Mr. Justice Stewart joined, and Mr. Justice Fortas did not participate.

The Court stated the primary question involved an interpretation of Section 7(b) of the Federal Water Power Act of 1920 as amended concerning the relative merits of Federal versus non-federal development and whether Congress or the Commission should make the ultimate decision as to the construction proposed. (Page 431 of opinion). The Court cited the authority under which the Commission acted as 49 Stat. 840, 16 U. S. C. Section 797(e).

> "Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified

> in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission."

The Commission solicited the views of the Secretary of the Interior. The Secretary requested a postponement for the purpose of accomplishing studies as to the effect on fisheries but the hearing was continued and ultimately closed without receiving or considering evidence from him. After the record was closed but before the decision, the examiner received and included in the record a petition from the Secretary that a recommendation be made to Congress to consider authorizing Federal construction of the project. The Secretary was allowed to file exceptions to the record and briefs. The examiner found that "there is no evidence in this record that Federal development will provide greater . . . fish passage, navigation or recreation and there is substantial evidence to the contrary." (Page 433 of opinion).

The remand was for the purpose of allowing "an exploration of these neglected phases of the case as well as other points recommended by the Secretary." (Page 450 of opinion).

Upon consideration of the authority under which the Federal Power Commission acted it is understandable why no issue was made in Udall as to the relevance of the views of the Secretary of the Interior. Traditionally, his duties have included those of representing and protecting conservation in the Federal Domain. As noted, the Federal Water Power Act itself places a burden upon the Commission to consider "other beneficial public uses, including recreational purposes." No such relevant words appear or can by logical interpretation be found in the law under which defendants here operated. This case

does not decide or point the way toward a decision in the case under consideration.

Defendants also place great reliance on U. S. ex rel, *Greathouse* v. *Dern*, 289 U. S. 352 (1933). There, Dern petitioned in the appropriate court of the District of Columbia for a Writ of Mandamus to compel Dern, the Secretary of War, to authorize construction of a wharf in navigable waters. The lower court denied the petition and on certiorari the Supreme Court affirmed. That Court said:

> "It is apparent that petitioners are entitled to the relief prayed *only* if several doubtful questions are resolved in their favor." (Page 357) (Emphasis supplied).

Among those questions were whether a mandatory duty is imposed on the Secretary by Section 10 of the Rivers and Harbors Act to authorize the construction if he is satisfied that it will not interfere with navigation and several other questions which generally concerned the plaintiff's ownership of the property, whether petitioners had legal right to construct the wharf absent the Secretary's authorization and finally whether any rights of petitioner were not in fact subordinate to the right of the United States, as proprietor and sovereign, to use said property as part of the right-of-way for the George Washington Memorial Parkway, the authority for and location of which Congress had approved. The Court said that it would consider all those "doubtful" questions together, that the allowance of the remedy of mandamus is controlled by equitable principals and that a *Court* of equity, in the exercise of sound discretion could withhold the grant thereof. It further held that the denial of the writ should be affirmed "even if petitioner's title to the upland adjacent to the river and their right to build the wharf were less doubtful than they are."

Greathouse is not determinative of the case at bar.

The taking, control or limitation in the use of private property interests by an exercise of the police power of the government for the public interest or general welfare should be authorized by legislature [sic] which clearly outlines procedure which comports to all constitutional standards. This is not the case here.

As this opinion is being prepared the Congress is in session. Advocates of conservation are both able and effective. The way is open to obtain a remedy for future situations like this one if one is needed and can be legally granted by the Congress.

This Court has jurisdiction and there is no genuine issue as to any material fact.

Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U. S. C. 403 (1964) even if said statute is read in para materia with the U. S. Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U. S. C. 661, et seq., does not vest the Secretary of the Army with discretionary authority to deny an application for a dredge and fill permit thereunder where he has found factually that the construction proposed under the application would not interfere with navigation.

Much is made here of the choice of remedies available to the Court. While each of the several possible ones have traditional uses and limitations, the need for relief to plaintiffs having been established the Court has power to grant the relief.

At hearing the Court announced its ruling and subsequent thereto defendants filed a motion to stay to which plaintiff has not objected.

Being advised, it is,

ORDERED and ADJUDGED:

1. The defendants' motion to amend their answer to request for admissions No. 9 be and the same is hereby granted.

2. The plaintiffs' motion for summary judgment be and the same is hereby granted.

3. The defendants' motion for summary judgment be and the same is hereby denied.

4. The defendant, R. P. Tabb, and the defendant, Stanley R. Resor, Secretary of the Army, or their respective successors in office, are hereby directed to issue a permit from the Department of Army in accordance with the application of plaintiffs.

5. Said defendants are hereby ordered not to interfere with plaintiffs' dredging and filling operations so long as the same are carried out in conformance with their application and the permit herein ordered to be granted.

6. Defendants' motion to stay be and is hereby granted, and performance and compliance by defendants hereunder and herewith is stayed until a timely appeal of this case is considered and decided by the United States Court of Appeals for the Fifth Circuit.

DONE and ORDERED in Chambers at Tampa, Florida, this 17th day of February, 1969.

BEN KRENTZMAN
United States District Judge

APPENDIX C

SUBJECT: Application for Department of the Army Permit—Zabel-Russell

Office, Special Assistant to the Secretary of the Army for Civil Functions, Wash., D.C. 28 FEB 1967

TO: Chief of Engineers

You are authorized to have the applicants notified that their application for a permit to dredge and fill in Boca Ciega Bay, Pinellas County, Florida, has been carefully considered with findings and conclusions as follows:

a. Based on all the available evidence, issuance of the requested permit

1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,

2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),

3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and

4. Would be contrary to the public interest.

b. Accordingly, the application for permit is denied.

BY DIRECTION OF THE SECRETARY OF THE ARMY:

/s/ R. A. HERTZLER
R. A. HERTZLER
Chief, Office of Civil Functions

Incls: n/c

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

July 16, 1970

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Re: No. 27555—Zabel and Russell vs Tabb

Gentlemen:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgement has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Frances Wolff
Deputy Clerk

enc. cc: Mr. John L. Briggs
Hon. Shiro Kashiwa
Mr. Thomas M. Harris
Mr. Frank Beroni

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

August 10, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 27555—Zabel and Russel vs Tabb

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Pat Quastararo
Deputy Clerk

cc: Mr. David D. Hochstein
U.S. Attorney
Mr. Thomas M. Harris
Mr. Frank Bezoni

APPENDIX F

Constitutional Provision and Statutes Involved

1. United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301 *et seq.*:

> "SEC. 2. When used in this Act—
>
> . . . .
>
> (d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign . . . .
>
> (e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;
>
> . . . ."

(43 U.S.C. § 1301)

"SEC. 3. RIGHTS OF THE STATES.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

. . . .

(d) Nothing in this Act shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

. . . ."

(43 U.S.C. § 1311)

"SEC. 6 POWERS RETAINED BY THE UNITED STATES.—(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act."

(43 U.S.C. § 1314(a))

3. The Fish and Wildlife Act of 1956, 70 Stat. 1119, 16 U.S.C. §§ 742a *et seq.*:

"SEC. 3. (a) There is hereby established within the Department of the Interior the position of Assistant Secretary for Fish and Wildlife, and the position of Commissioner of Fish and Wildlife. Such Assistant Secretary shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the same rate as other Assistant Secretaries. The Commissioner shall be appointed by the President by and with the advice and consent of the Senate. . . . There is also established a United

States Fish and Wildlife Service within the Department, consisting of two separate agencies, each of which shall have the status of a Federal bureau. . . ."

(16 U.S.C. § 742b)

"SEC. 10. Nothing in this Act shall be construed (1) to interfere in any manner with the rights of any State under the Submerged Lands Act (Public Law 31, Eighty-third Congress) or otherwise provided by law, or to supersede any regulatory authority over fisheries exercised by the States either individually or under interstate compacts; or (2) to interfere in any manner with the authority exercised by any International Commission established under any treaty or convention to which the United States is a party."

(16 U.S.C. § 742i [Supp. V])

4. The Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 72 Stat. 563, 16 U.S.C. §§ 661 *et seq.*:

"SEC. 2. (a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development

and improvement thereof in connection with such water-resource development."

(16 U.S.C. § 662(a))

5. The Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. §§ 401 *et seq.*:

"SEC. 10. The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

(33 U.S.C. § 403)

APPENDIX G

Excerpts from the Legislative History of the Submerged Lands Act

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H.R. Rep. No. 1778, 80th Cong., 2d Sess., pp. 13-23
S. Rep. No. 1592, 80th Cong., 2d Sess., pp. 15-25

[The following excerpts are identical in both of these reports except as noted.]

Possession and use of submerged coastal lands by the States

The earliest assertions by the States of proprietary rights in their submerged lands arose in connection with regulation of fishing. Except in a few instances, where international treaties were involved, State control of fishing in navigable waters, within the State's boundaries, has been exclusive. The principal basis for this right to control fishing rests upon the proprietary rights of the State to the waters and the soil thereunder. Proprietary rights further have been exercised by granting leases for harvesting kelp, removing sand, gravel, shells, sponges, etc. States and their grantees have expended millions of dollars to build piers, breakwaters, jetties, and other structures, to install sewage-disposal systems and to fill in beaches and reclaim lands. During the past two decades California, Louisiana, and Texas have been leasing substantial portions of the lands in question for oil, gas, and mineral development. California commenced such leasing in 1921 and Texas in 1926. Other States, including Washington, Florida, Mississippi, North Carolina, and Maryland, have made leases for like purposes. States have levied and collected taxes upon interests in and improvements on these lands. It appears to the committee that the States have exercised every sovereign right incident to the utilization of these submerged coastal lands.

• • • •

Equity best served by establishing State ownership

The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.

The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.

If these same facts were involved in a dispute between private individuals, an equitable title to the lands would result in favor of the person in possession. The Court in the California case states, as a matter of law, that the Federal Government—

> is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; * * *

The effect of this ruling of the Court is to place the State of California in the same legal position as an individual, thereby depriving it of its status as a sovereign. It should be noted that the case of *U.S. v. California* was a controversy between two sovereigns, namely, the United States on the one hand and the State of California on the other, both of which occupied equal dignity as sovereigns. The sovereign

rights enjoyed by the United States were in the first instance derived from the States and the sovereign powers of the United States can rise no higher or have any greater effect than that which was delegated to the Central Government by the Constitution. The committee believes that, as a matter of policy in this instance, the same equitable principles and high standards that apply between individuals, should be applied by Congress as between the National Government and the sovereign States. (See *Indiana* v. *Kentucky*, 136 U.S. 479, 500 (1890); *U.S.* v. *Texas*, 162 U.S. 1, 61 (1896); *New Mexico* v. *Texas*, 275 U.S. 279 (1927).)

Therefore, the committee concludes that in order to avoid injustices to the sovereign States and their grantees, legislative equity can best be done by the enactment of S. 1988.

* * * * *

IT IS NOT IN THE PUBLIC INTEREST THAT ADMINISTRATION AND CONTROL OF SUBMERGED LANDS BE TRANSFERRED FROM THE STATES TO THE FEDERAL GOVERNMENT

This problem, as suggested by Mr. Justice Frankfurter, "involves many far-reaching, complicated, historic interests." Here we have the broad question whether Congress should confirm or whether it should reverse the traditional and long-accepted policy and practice that submerged lands within a State's boundary and all resources therein belong in a proprietary sense to the States, subject, of course, to all powers delegated to the United States by the Constitution. This far-reaching historic policy should be reversed only if the national interest demands such reversal. The committee is of the opinion that not only will the public interest be best served by confirming the rights of the States but that common justice and equity require such action.

The only reason advanced by the Federal officials who advocate the change is their desire for Federal

management of the production of oil. It is noteworthy that the controversy had its inception in 1937 by reason of the Federal departments' attempt to secure congressional sanction of their plans to assume control of the oil fields off the California coast. The subject matter of the litigation instituted by the Department of Justice and resulting in the decision in *United States* v. *California* was oil. The Departments of the Interior, Justice, and Defense base their objection to the continuance of State management of submerged lands on the sole ground that such lands contain valuable oil deposits. In their testimony the representatives of the Federal departments have admitted that they are not interested in anything but the oil. The Government's management bill deals only with oil. When asked why the Federal Government was not interested in other products, Attorney General Clark stated:

> Because we told the Court we were not. That is the policy of the Government.

The committee does not agree that the problem is limited to oil. The Court's opinion in the California case is not limited to oil. The paramount power under which the Federal Government now claims the right to take the oil without compensation extends to the 3-mile belt in all its aspects. The problem before Congress is as broad as the Court's decision [and the intentions of the Federal departments].*

Public interest as to oil in submerged lands

* * * *

Public interest as to resources other than oil

The Court's decree in the California case covered not only the oil but the land, minerals, and "other things" underlying the ocean in the 3-mile belt.

The fishing industry is one of the major industries in our country and represents an important source

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* Bracketed language does not appear in Senate version.

of our food supply and of our national income. State control of fishing, especially for sedentary fish, such as shrimp, oysters, clams, crabs, lobsters, etc., has been based upon the State's ownership of the soil. Regulations by many States are based upon the statutory declaration of the State's ownership of the waters and the fish in them. In *Smith* v. *Maryland* (18 How. 74) the Court said:

> The State holds the *propriety* of this soil for the conservation of the public rights of fishing thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. * * * *This power results from the ownership of the soil*, from the legislative jurisdiction of the State over it, and from its duty to preserve those public uses *for which the soil is held.* [Italics supplied.]

Kelp is a very important product in California's 3-mile belt. It grows from the bed of the sea and is, like grain, harvested with a reaper. It is a potential source of potash salts and iodine. In the year 1945, 37,542 tons of kelp were harvested under State leases. In 1911 the Department of Agriculture said:

> The giant kelp beds of the Pacific coast are * * * a national asset of first importance. (See S. Doc. 190, 62d Cong., 2d sess.)

In many of the coastal States there are other important industries that take resources from the soil of the 3-mile belt, such as sponges, sand, gravel, shell, etc.

No witness contended that the California decision is not broad enough to permit Federal regulation of these resources. No evidence was submitted to show that the public interest would be better served by transferring the management of these resources to the Federal Government and thereby destroy the existing controls that have been long established by the States.

Representatives of the Federal departments in effect admitted the efficacy of continued State management by their statements that they were not interested in the fish, shrimp, oysters, kelp, and other products of the marginal sea. No explanation has been given for this discriminatory policy whereby the oil lessees are to be subject to Federal control while other lessees of submerged lands remain under State control.

Under the holding in the California case, the administrative officers now in office can no more legally waive the rights of the Federal Government to these other resources by saying they are not interested in them, than could their predecessors in office legally waive the Federal Government's paramount rights over the oil by ruling the submerged lands belonged to the States.

Only the Congress can assure the States, and the widespread and important industries affected, that they will not be subject to Federal control but will remain under State control. The committee believes that they are entitled to such assurance from the Congress.

Other public interests in submerged lands

Apart from the resources which may be taken from submerged lands, the States have other interests in the use of such lands. Many piers, docks, wharves, jetties, sea walls, groins, pipe lines, sewage-disposal systems, acres of reclaimed land and filled-in beaches, etc., have been established and many more will be established on these lands. The recreational use of the submerged areas along the Atlantic, Pacific, and Gulf coasts has become of great importance. The uses to which these lands are put are essentially local in character, and are of primary concern to the people of the particular locality. Any conflict of interests arising from the use of the submerged lands should be and can best be solved by local authorities.

Even if the departments' proposed S. 2222 is enacted, confusion and delay in programs for the future development of these lands (for example, the $100,000,000 program in the city of Los Angeles) are inevitable, inasmuch as all development after June 23, 1947, would be subject to Federal authority. First, the demarcation line between the so-called inland waters and the submerged coastal area must be drawn in order to determine jurisdiction. Secondly, a complete new Federal procedure duplicating State procedure must be established. Then the portion of the improvement situated on lands between high- and low-water mark will be under State jurisdiction, while the portion situated on lands seaward from low-water mark will be under Federal jurisdiction. The confusion and practical difficulties seem obvious and interminable.

No witness contended that the Federal Government had any need to own or control the submerged lands for these purposes. The committee believes that the States have such need, and is of the opinion that these interests are so intimately connected with local activities that it constitutes another paramount reason why the control of these submerged lands should not be taken from the local authorities and transferred to a centralized Federal authority.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 955

HELEN DOROTHY ZABEL, Extrx., *et al.*, Petitioners

v.

R. P. TABB, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-49) is reported at 430 F.2d 199. The opinion of the district court (Pet. App. 50-63) is reported at 296 F. Supp. 764. The decision of the Secretary of the Army (Pet. App. 64) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on July 16, 1970 (Pet. App. 65), and a petition for

rehearing was denied on August 10, 1970 (Pet. App. 66). The petition for a writ of certiorari was filed on November 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress, in the Rivers and Harbors Act of 1899 and the Fish and Wildlife Coordination Act of 1958, has authorized the Secretary of the Army to deny an owner of lands beneath navigable waters a permit to dredge and fill where the work will have a harmful effect on fish and wildlife and would be against the public interest.

2. Whether Congress may constitutionally authorize the Secretary of the Army to refuse to lift the congressional ban on filling in navigable waters for those reasons.

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended

by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Sections 2 and 2(a) of the Fish and Wildlife Coordination Act of March 10, 1934, 48 Stat. 401, as amended, 16 U.S.C. 661 and 662(a), provide:

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of sections 661-666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant spe-

cies, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections.

Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

STATEMENT

Petitioners own land adjacent to Boca Ciega Bay and littoral land underlying the Bay of Pinellas County near St. Petersburg, Florida (Pet. App. 22-23). The Bay is navigable water of the United States, being an arm of Tampa Bay which opens into the Gulf of Mexico (Pet. App. 23). Petitioners sought permission from state and local authorities to dredge and fill on their property in the Bay in order to construct a trailer park, with a bridge or culvert to their adjoining upland (Pet. App. 23). After obtaining that permission from the appropriate agencies, either by consent or court order,[1] petitioners then applied to the Corps of Engineers for a federal permit to perform the dredging and filling, under Section 10 of the Rivers and Harbors Act of 1899, *supra* (Pet. App. 24).

The application was formally opposed by several state and local agencies not having jurisdiction over the proposed work and by some 700 individuals. It was also opposed by the United States Fish and Wildlife Service of the Department of the Interior, because the Service believed that the dredging and filling would have a distinctly harmful effect on the fish and wildlife resources of the Bay (Pet. App. 24). A public hearing was held, after which respondent Tabb,

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[1] One such agency issued its permit only after it was ordered to do so by the Florida District Court of Appeal, *Pinellas County Water & Nav. Con. Auth.* v. *Zabel*, 179 So.2d 870, after the agency's initial refusal was overturned by the Supreme Court of Florida. *Zabel* v. *Pinellas County Water & Nav. Con. Auth.*, 171 So.2d 376.

the District Engineer, recommended denial of the application. Colonel Tabb stated in his recommendation that the "proposed work would have no material adverse effect on navigation" but that approval of the application would not serve the intent of Congress expressed in the Fish and Wildlife Coordination Act[2] in view of the damage to fish and wildlife resources expected to result from the proposed work (Pet. App. 24-25). The Secretary of the Army denied the application because issuance of the requested permit (Pet. App. 64):

> 1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,
>
> 2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),
>
> 3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and
>
> 4. Would be contrary to the public interest.

Petitioners then sued to review the Secretary's decision, seeking an order compelling the issuance of the permit (Pet. App. 25). The district court's order directing the Secretary to issue the permit (Pet. App. 63) was reversed by the court of appeals, which entered judgment for the Secretary (Pet. App. 49).

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[2] 48 Stat. 401, as amended, 16 U.S.C. 661 *et seq.*

ARGUMENT

The decision below, as stated by the court of appeals (Pet. App. 33-34):

> rests immediately on the Rivers and Harbors Act, 33 U.S.C.A. § 403, which declares that "the creation of any obstruction * * * to the navigable capacity of any of the waters of the United States is prohibited." The Act covers both building of structures and the excavating and filling in navigable waters. It is structured as a flat prohibition *unless*—the unless being the issuance of approval by the Secretary after recommendation of the Chief of Engineers. The Act itself does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit to one seeking to build structures on or dredge and fill his own property. * * * [Footnotes omitted.]

Petitioners do not contend that the 1899 Act is unconstitutional because of the flat prohibition or that the delegation to the Secretary of the power to grant relief from the prohibition was unlawful. See *Wisconsin* v. *Illinois*, 278 U.S. 367, 378. In exercising this power, the Secretary must be sensitive to the national policy of conservation of wildlife resources declared in the Fish and Wildlife Coordination Act, *supra*. His actions in this regard must be no less responsive to that policy, we submit, than that of other federal officers. Cf. *Udall* v. *Federal Power Commission*, 387 U.S. 428, 443-444, 450. The refusal to issue the permit was, therefore, a proper exercise of the Secretary's discretionary authority and correctly upheld as such by

the court of appeals.[4] Finally, there has been no charge that the Secretary was arbitrary or capricious in his determination. Accordingly, the court of appeals held that the Secretary was entitled to consider adverse ecological impact in passing on a permit application and that he could refuse to grant a permit to dredge and fill where, in his informed judgment, the Secretary determined that granting such permit would not be in the public interest.

This Court has said that the 1899 Act is a "broad expression of policy in unmistakable terms" (*Sanitary District* v. *United States*, 266 U.S. 405, 429), which must be read "charitably in light of the purpose to be served" (*United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491). The Court has on numerous occasions recognized that considerations other than navigation may be weighed in granting, denying or revoking a permit under the Act. *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426-427; *United States* v. *Dern*, 289 U.S. 352, 357, 359-361; *Sanitary District*, *supra*, 266 U.S. at 425-426. This broad approach, followed by the court below, is clearly appropriate under the federal commerce power, whose "authority is as broad as the needs of commerce." *Appalachian Power Co.*, *supra*, 311 U.S. at 426. Contrary to petitioners' argument (Pet. 9-13), passage of the Submerged

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[4] Contrary to petitioners' contention, no taking of property could result from such refusal, for the simple reason that petitioners never had a right to fill in the navigable waters of the United States. *Scranton* v. *Wheeler*, 179 U.S. 141, 163; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 72. The most they had was an expectancy that the Secretary might lift the prohibition of the Act.

Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, in no way restricted that authority. "The [Submerged Lands] Act left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them." *United States* v. *Rands*, 389 U.S. 121, 127.

There is no need for this Court to examine the range of factors the Secretary may consider in passing on permit applications under the 1899 Act. The court of appeals treated the subject thoroughly and, we submit, correctly. The lower court's opinion follows this Court's pronouncements and the result reached here is not in conflict with the decisions of this or any other court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 955

HELEN DOROTHY ZABEL, EXECUTRIX OF THE ESTATE OF ALFRED G. ZABEL, DECEASED, AND UNION TRUST NATIONAL BANK OF ST. PETERSBURG, FLORIDA, AND ED W. HARRIS, CO-EXECUTORS OF THE ESTATE OF DAVID H. RUSSELL, DECEASED,

Petitioners,

v.

R. P. TABB, COLONEL, CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA, DISTRICT; STANLEY R. RESOR, SECRETARY OF THE ARMY; AND UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF FOR PETITIONERS

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HELEN DOROTHY ZABEL, EXTRX., *et. al.*,
Petitioners,

v.

R. P. TABB, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS

The government's brief in opposition fails almost entirely to deal with the issues involved, and endeavors to sweep away petitioners' arguments with unfounded generalizations. This is done to such an extent that a short reply seems warranted to point out the basic misconceptions in the principal arguments advanced by the government.

1. As pointed out in the petition (pp. 8-9), § 10 of the Rivers and Harbors Act deals with obstructions to "navigable capacity"; accordingly, the heretofore unbroken interpretation of the Act has been that the granting of permits under it turns on whether the proposed work will interfere with navigation. The government would brush aside this purpose and consistent interpretation of the Act with the statement (Br. Opp. p. 8) that this Court "has on numerous occasions recognized that

considerations other than navigation may be weighed in granting, denying or revoking a permit under the Act." However, this Court has never so recognized, and it most certainly did not do so in the three cases cited by respondents (Br. Opp. p. 8).

The *Appalachian* case,[1] cited by respondents, has nothing whatever to do with the scope of the Secretary's authority under § 10 of the Rivers and Harbors Act; the portion of the opinion cited by respondents deals solely with the constitutionality of certain licensing provisions embodied in the Federal Water Power Act. See 311 U.S. at 419-22.

The *Sanitary District* case[2] is likewise devoid of support for respondents' assertion. The language referred to by respondents (266 U.S. at 425-26) has to do solely with the constitutional foundations for congressional authority over navigable waters. There is no indication anywhere in the opinion that the challenged action of the Secretary was based on "considerations other than navigation"; to the contrary, the Secretary had acted on the basis of "overwhelming evidence" that the state's withdrawal of water from Lake Michigan would "affect navigation." 266 U.S. at 430.

The third case cited by respondents, *United States* v. *Dern*,[3] is also wholly inapposite, for the reasons set forth in the petition (p. 8, n. 6).

2. Nor can the property rights granted to petitioners by the Submerged Lands Act be denied by question begging reference to the paramount servitude of the United States (Br. Opp. pp. 8-9) or by the assertion (*ibid.*, p. 8, n. 3) that "no taking of property could result" from the Secretary's denial of a dredge and fill permit "for

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[1] *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940).

[2] *Sanitary District* v. *United States*, 266 U.S. 405 (1925).

[3] 289 U.S. 352 (1933).

the simple reason that petitioners never had a right to fill in the navigable waters of the United States," citing *Scranton* v. *Wheeler*[4] and *United States* v. *Chandler-Dunbar Co.*[5] Under the Submerged Lands Act petitioners manifestly did have such a right, subject only to the paramount servitude reserved to the United States in that Act. As pointed out in the petition (pp. 16-17), and as the cases cited by respondents make clear, the paramount servitude of the United States over navigable waters has always been viewed as a power limited in its scope to the regulation and improvement of navigation. In the *Scranton* case, this Court stated that the title of a riparian owner in submerged lands is "a qualified title . . . to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by *the public right of navigation*." 179 U.S. at 163. (Italics added.) In the *Chandler-Dunbar Co.* case, this Court stated that title to the bed of a navigable river is "absolutely subordinate *to the right of navigation* and no right of private property would have been invaded if such submerged lands were occupied by structures *in aid of navigation* or kept free from such obstructions *in the interest of navigation*." 229 U.S. at 72. (Italics added.)

Respondents' attempt to invoke the navigational servitude of the United States thus utterly fails to support their assertion that petitioners never had the property right they claim. It also falls before the administrative finding that petitioners' "proposed work would have no material adverse effect on navigation." In the absence of justification for the Secretary's action on navigational grounds, petitioners are at least entitled to compensation for the denial of the only use to which their submerged property could be put. (See Pet. pp. 17-18.)

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[4] 179 U.S. 141 (1900).

[5] 229 U.S. 53 (1913).

CONCLUSION

For the reasons stated in the petition and this reply brief, the petition should be granted.

Respectfully submitted,

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